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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 34

THE UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND WOOD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the Police Court. The opinion of the Court of Appeals (R. 8) is reported in 83 F. (2d) 587.

JURISDICTION

The judgment of the Court of Appeals was entered March 25, 1936 (R. 16). The petition for writ of certiorari was filed on April 20, 1936, and was granted on May 25, 1936 (R. 17). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Rule XI of the Rules of Practice and

Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the Act of Congress removing the disqualification of Government employees and pensioners as jurors in the District of Columbia in cases in which the United States is a party contravenes the Sixth Amendment to the Federal Constitution.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article VI of the Amendments to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Act of August 22, 1935, c. 605, 49 Stat. 682:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 360 of title 18 of the Code of the District of Columbia of 1929, otherwise known as "section 217 of the Code of Law for the

District of Columbia", approved March 3, 1901, be, and the same is hereby, amended to read as follows:

"All executive and judicial officers of the Government of the United States and of the District of Columbia, all officers and enlisted men of the Army, Navy, Marine Corps, and Coast Guard of the United States in active service, those connected with the police and fire departments of the United States and of the District of Columbia, counselors and attorneys at law in actual practice, ministers of the gospel and clergymen of every denomination, practicing physicians and surgeons, keepers of hospitals, asylums, almshouses, or other charitable institutions created by or under the laws relating to the District of Columbia, captains and masters and other persons employed on vessels navigating the waters of the District of Columbia shall be exempt from jury duty, and their names shall not be placed on the jury lists.

"All other persons, otherwise qualified according to law whether employed in the service of the Government of the United States or of the District of Columbia, all officers and enlisted men of the National Guard of the District of Columbia, both active and retired, all officers and enlisted men of the Military, Naval, Marine, and Coast Guard Reserve Corps of the United States, all notaries public, all postmasters and those who are the recipients or beneficiaries of a pension or other gratuity from the Fed-

eral or District Government or who have contracts with the United States or the District of Columbia, shall be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service: *Provided,* That employees of the Government of the United States or of the District of Columbia in active service who are called upon to sit on juries shall not be paid for such jury service but their salary shall not be diminished during their term of service by virtue of such service, nor shall such period of service be deducted from any leave of absence authorized by law."

Approved, August 22, 1935.

Prior to the above amendment, Section 360 of Title 18 of the Code of the District of Columbia of 1929 read as follows:

360. *Exemption from jury service.*—All executive and judicial officers, salaried officers of the Government of the United States and of the District of Columbia, all officers and enlisted men of the National Guard for the District of Columbia, both active and retired, and those connected with the police or fire departments, counselors and attorneys at law in actual practice, ministers of the gospel and clergymen of every denomination, practicing physicians and surgeons, keepers of hospitals, asylums, almshouses, or other charitable institutions created by or under the laws relating to the District, captains and masters and other

persons employed on vessels navigating the waters of the District shall be exempt from jury duty, and their names shall not be placed on the jury lists.

STATEMENT

Respondent Wood was tried in the Police Court of the District of Columbia under an information charging petty larceny from the Palais Royal, a private corporation. At his trial twelve prospective jurors were called. One was the holder of a bonus certificate. Four were clerks, respectively, in the Weather Bureau, the Federal Emergency Relief Administration, the Treasury Department and at the Navy Yard. Another was a housewife who received a Civil War pension. Counsel for the respondent challenged these jurors, in that they were disqualified by their interest in the Federal Government, and excepted to the disallowance of the challenge. He then used his three preemptory challenges to strike the holder of a bonus certificate and the two clerks in the Weather Bureau and the Federal Emergency Relief Administration. The jury finally impaneled thus included the clerk in the Treasury Department, the clerk at the Navy Yard, and the recipient of a Civil War pension. Respondent renewed his challenge to these jurors and the jury was sworn over his objection and exception. (R. 4–5.)

Respondent was tried and convicted, a motion for a new trial on the ground that the jury

was illegally constituted was overruled, and sentence of confinement in jail for 240 days was imposed (R. 5). On appeal, the Court of Appeals for the District of Columbia reversed the judgment, Robb, J., dissenting (R. 14). This Court granted certiorari (R. 17).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding that the Act of August 22, 1935, is unconstitutional as contravening the Sixth Amendment.

2. In holding that Government employees and pensioners are disqualified by interest from acting as jurors in cases in which the United States is a party.

3. In reversing the judgment of the Police Court of the District of Columbia.

SUMMARY OF ARGUMENT

I

The Act of August 22, 1935, was passed in order to remove the disqualification supposed to attach to Government employees and pension holders when called to serve as jurors in Government cases in the District of Columbia. This was made necessary by the high ratio of Government employees among the residents of the District, amounting to more than 40 per cent of the eligible jurors. But in qualifying this type of juror, Congress did not

exempt him from the ordinary challenge for cause, and any Government employee may, like other jurors, be challenged for bias.

II

If the Government employee were a qualified juror in Government cases at common law when the Sixth Amendment was adopted, there is nothing in that Amendment which forbids Congress to authorize a similar practice for the District of Columbia.

III

Throughout the long period from the development of the jury system to modern times, the English common law has permitted a servant of the king to serve as a juror in Crown cases, providing he had no actual bias. Such is the unanimous verdict of the commentators from Fitzherbert to the nineteenth century, such is the unanimous holding or indication to be drawn from the cases from the Year Books to modern times, and such is the necessary consequence of the role of the king's sheriff in choosing the jurors in Crown cases.

The American views are in accord, with the possible exception of *Crawford* v. *United States,* 212 U. S. 183. This decision may be viewed as limited to a case where the Government employee was connected with a Department interested in the outcome of the case, but if it be viewed as of general appli-

cation it is asked that it be reexamined because not decided in the light of the established common law doctrine that the Government employee is on a different footing from the servant of a private party. Apart from this case, eighteen states, a Circuit Court of Appeals, the Court of Appeals of the District of Columbia, and a territorial court have decided that a public official was not disqualified to serve as a juror in a Government case, while none, where there was no actual bias, has come to a contrary conclusion.

In result, the jurors who served in this case were qualified at common law and irrespective of the Act of August 22, 1935.

IV

If, however, the Act should be viewed as a modification of the common law, it is submitted that the Sixth Amendment does not stand in the way. Dicta in the *Crawford* case indicate that its rule was intended to be subject to legislative modification. Since the supposed modification consists only in allowing a juror to serve when he is subject to a wholly hypothetical bias, and who is subject to challenge for any actual bias, it is inconsequential in character and is more remote from the essential elements of the trial by an impartial jury than are many other modifications which have been allowed under the Sixth Amendment.

The fact that thirty States by statute or decision have made a similar modification, if such it be, is

persuasive evidence that the essential features of the common law jury have not been reached by the Act, both because of the generality of the practice and because these States, too, have constitutional guaranties of trial by an impartial jury.

V

If there by any objection under due process which is not more appropriately raised under the Sixth Amendment, the Government believes it to be without substance.

ARGUMENT

I

FACTUAL BACKGROUND OF THE ACT AND EFFECT OF ITS PROVISIONS

The factual situation out of which grew the Act of August 22, 1935, needs little elaboration. The District of Columbia is a compact community whose economic life centers about the Federal Government. The effect upon the jury system of the District is summarized in the committee reports [1] recommending passage of the Act:

> At the present time it is exceedingly difficult to obtain the best personnel on juries in

[1] House Rept. 1421, Sen. Rept. 1297, 74th Cong., 1st Sess. The part quoted is found in both reports and includes the entire body of each report, save that the Senate report adds that the bill was drafted by a commission appointed by the District Commissioners and that the Commissioners recommended passage.

> the District, due to the many exemptions from service which now prevail. Section 360 of title 18 of the 1929 Code (sec. 217 of the 1901 Code) contains the statutory exemptions. In addition thereto, however, by judicial construction, the exemption in criminal cases has been extended to cover all employees of the District of Columbia or the United States, officers and enlisted men of the National Guard, the Military, Naval, Marine, and Coast Guard Reserve Corps, notaries public, postmasters, receivers, and beneficiaries of pensions or gratuities from the Federal or District Government, and all those who have contracts with the United States or the District of Columbia. These exemptions take from those who would otherwise be qualified some of the best jurymen available and makes the empaneling of a jury much more difficult. This bill would eliminate these additional exemptions above stated.

Senator King, in charge of the bill, urged its passage because:[2]

> * * * the bill is recommended by the bar association, by the District Commissioners, and by the corporation counsel. Under existing law there are so many exemptions that it is sometimes difficult to obtain a jury. It is the desire to limit the number of exemp-

[2] 79 Cong. Rec. 13401. There was no other discussion of the bill, and it passed each House without roll call. 79 Cong. Rec. 11584, 13401.

tions so it may be possible to draw jurors from a broader citizenship and to have an improved service in the District.

Since it is impossible to obtain complete figures for all relevant classifications of the District of Columbia population, the facts to which the legislative history refers cannot be established with complete precision. However, tolerably accurate estimates can be made. The qualifications of jurors are prescribed in Section 357 of Title 18 of the Code of the District of Columbia. In 1930 there were 300,271 qualified jurors available.[3] By 1935 this figure may be taken to have increased to 366,330.[4] Of the exemptions from jury duty pro-

[3] The figures are drawn from Fifteenth Census, Population, Bureau of the Census, Department of Commerce, and citations are to that publication.

In 1930 there was a total population of 486,869 (IV, 321). Of these, 136,446 were under 20, 9,887 were 20 (one-fifth of 20–24 classification), and 27,253 were over 65 years of age (III, pt. 1, 385). This leaves 313,283 of the requisite age qualifications. Of the total District population 2.3 per cent are aliens and 1.9 per cent of those over 21 are illiterate (III, pt. 1, 386). If it be assumed that this ratio holds for the age groups 21–65, 7,206 and 5,816 are, respectively, disqualified by these requirements, leaving a total of 300,261. It is impossible to obtain a figure for the number of the residents of the District who have been convicted of a felony or a misdemeanor involving moral turpitude.

[4] The total population was estimated to have increased from 486,869 to 594,000. Press Release of May 11, 1936, Bureau of Census, Department of Commerce, p. 2. This is an increase of 22.0% and may be assumed to have been reflected proportionately in the 21–65 age group.

vided by Section 360, prior to its amendment in 1935, those relating to attorneys, clergymen, physicians, masters, and sailors employed on vessels, firemen, policemen, soldiers, sailors, and marines may be said to be usual and necessary.[5] Those included in these exemptions numbered 10,155 in 1930,[6] and may be assumed to have increased to 12,381 by 1935.[7] This leaves a total of 353,949 who would be eligible for jury service apart from their Government employment.

In 1935 there were 111,692 permanent and temporary civil employees in the executive branch of the United States Government in the District of Columbia.[8] In the same year there were 13,226 employees of the District of Columbia,[9] 9,442 em-

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[5] The other exemptions are keepers of hospitals and charitable homes and asylums, members of the National Guard, and "all executive and judicial officers, salaried officers of the Government of the United States and of the District of Columbia." In Section 358 of Title 18 of the Code of the District of Columbia it is provided that jury service shall not be compulsory for women.

[6] In 1930 there were, of an age under 65, 3,250 attorneys (IV, 328, 329), 653 clergymen (IV, 328), 1368 physicians (IV, 328, 329), 105 persons employed on vessels (IV, 322, 323), 708 firemen (IV, 325), 177 marshals and detectives (IV, 325), 1,177 policemen (IV, 325), and 2,717 soldiers, sailors, and marines (IV, 325).

[7] Assuming that the number engaged in these occupations increased, as did the total population, by 22.0 per cent.

[8] Semi-Annual Statement of United States Civil Service Commission, December 31, 1935, p. 5.

[9] There were 10,226 permanent employees, 1937 Budget Message, p. 813, and the office of the District Government reports an average of 3,000 temporary employees.

ployees of the legislative branch of the United States Government,[10] and 18,654 otherwise qualified residents of the District benefiting by emergency work or relief programs.[11] This gives a total of 153,874 otherwise eligible jurors who are employed by the United States.[12] To this figure must be added the 3,860 veterans in the District of Columbia who are receiving disability compensation.[12] This gives a total of 156,874 otherwise eligible jurors who would be disqualified were the mere fact of employment by or receipt of benefits from the Government to make their ineligible.[13]

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[10] 1937 Budget Message, p. 809. All of these employees may be assumed to be employed in the District of Columbia.

[11] The figures are 6,940 employed by the Works Progress Administration and 3,243 by the Public Works Administration; they were obtained from the records of the two Administrations. In August 1935, 8,471 cases were receiving direct relief alone. Public Assistance Division of District of Columbia, Monthly Statistical Report, Table 3. Since 69.2 per cent of these cases were families, it is conservative to assume that each case involves one prospective juror.

[12] Figures from the records of the Veterans' Administration. From the same source it appears that 26,850 residents of the District received the veteran's bonus. An indeterminate number of these men are in the Government service and it has been thought best to ignore the entire group.

[13] The figure is inaccurate. A good number of these employees live outside of the District and a smaller number are outside of the 21–65 age group. It has arbitrarily been assumed that these would approximately be off-set by the total of: (1) employees of the judicial branch resident in the District who would otherwise be eligible; (2) those receiving civil disability compensation; (3) those under 65 receiving pensions of various types; and (4) bonus recipients not employed by the Government.

These persons represent 44.3 per cent of all the eligible jurors in the District of Columbia. It should be noted that this figure would be much higher if the members of the immediate family of the Government employee were also included and would reach a startling proportion if it included those who had contracts with the Government, and their employees.

To remedy this situation the Act of August 22, 1935, was passed. It continued the exemption from jury service of executive and judicial officers of the United States and the District, of officers and enlisted men in active service in the Army, Navy, Marine Corps and Coast Guard, and those connected with the police and fire departments. It then provided that—

> All other persons, otherwise qualified according to law whether employed in the service of the Government of the United States or of the District of Columbia, all officers and enlisted men of the National Guard of the District of Columbia, both active and retired, all officers and enlisted men of the Military, Naval, Marine, and Coast Guard Reserve Corps of the United States, all notaries public, all postmasters, and those who are the recipients or beneficiaries of a pension or other gratuity from the Federal or District Government or who have contracts with the United States or the District of Columbia, shall be qualified to serve as

> jurors in the District of Columbia and shall not be exempt from such service: * * *

The Act states that "persons * * * employed in the service of the Government of the United States or of the District of Columbia", and also "those who are the recipients or beneficiaries of a pension or other gratuity from the Federal or District Government or who have contracts with the United States or the District of Columbia" shall be qualified to serve as jurors. The phrase first quoted is much broader than "executive and judicial officers, salaried officers of the Government of the United States or of the District of Columbia" (section 360 before amendment) and qualifies persons who were neither disqualified nor exempt in cases not involving the Government. The second phrase, covering pension holders and contractors, specifies a class of jurors fully qualified to serve in non-Government cases. It is plain that the Act was intended to remove the disqualification assumed to attach to these persons when called to serve as jurors in a Government case; otherwise their specification would be wholly meaningless.

If there were any doubt as to this construction, it would be removed by the committee reports which state that these persons were to be declared qualified because "by judicial construction, the exemption in criminal cases has been extended to cover" them (see p. 10, *supra*). The practice under this Act has been that the Government em-

ployee, pension-holder, or contractor is not for this reason alone disqualified to serve as a juror in a Government case. The court below has so construed the Act; it assumed that the jurors challenged in this case were qualified under the Act, and held the Act unconstitutional (R. 9–10, 12). It seems plain that the Act was intended to remove not only personal exemptions but also the disqualification assumed to attach to any governmental employee, pensionholder or contractor called to serve as a juror in a Government case.

But there is nothing in the Act to suggest that the ordinary challenge for cause is to be forbidden against these jurors. They are merely declared to "be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service." They are expressly required to be "otherwise qualified according to law." Their position is thus no different from that of any other qualified juror and the Act contains nothing on which any special immunity to challenge could be rested. It seems quite plain that the Government employee or pension holder, whose exemption from jury service is removed by this statute, is fully as subject to a challenge for bias as is any other qualified juror. For example, employment in the prosecuting branch of the Government might well be the basis of a challenge to a juror in a criminal case. So, too, an employee in the Veterans' Administration would be subject to challenge in a suit on a War

Risk Insurance policy. Similarly, any person made a qualified juror by this Act would be subject to any challenge directed to his personal relations to a party or to any conduct which indicated partiality. The sole purpose of the Act was to remove a disqualification which was based upon the unrealistic hypothesis that each employee or pension holder of the Government has such an interest in seeing the Government win *any* case that he cannot be an impartial juror.

The present case illustrates the small likelihood of bias on the part of a juror subject to no possible challenge save his employment by the Government. The case involves theft from a private corporation, the Palais Royal (R. 4). The jury included a clerk in the Treasury Department, a clerk at the Navy Yard, and the recipient of a Civil War pension [14] (R. 4–5). It may be presumed that they, in common with most citizens, disapproved of theft and believed that the guilty thief should be punished. But any contention that they must have felt a special interest in seeing the United States win its case ignores the realities of the situation. They had no more contact with the law enforcement and

[14] The three jurors struck by peremptory challenge were clerks in the Weather Bureau and the Federal Emergency Relief Administration and the holder of a bonus certificate. While their qualifications are not before this Court, *Spies* v. *Illinois*, 123 U. S. 131, 168, it should be noted that their position differs in no manner from those remaining on the jury.

prosecuting branches of the Government than did any resident in private employment. It seems impossible that these jurors should feel any sense of solidarity with or partiality toward the prosecuting attorney merely because he, as do they, regularly receives checks drawn on the Treasury. Intimacy and favor become diluted far beyond their perception when the bonds said to constitute the attachment run indifferently to each of 150,000 others.

If the juror is to be held biased merely because he is a Government employee, we are unable to see that the private party can ever have a fair trial in a Government case. For every Federal judge receives his salary, not from some disinterested source, nor even from both litigants indifferently, but from the Government alone. If it be thought that the supposed bias would flow not only from favor to the source which pays the salary but also from fear of punitive action, it need only be pointed out that the territorial judges and the judges of the inferior courts of limited jurisdiction in the District (including the judge of the Police Court in this case) hold office only for a term. Unless it be thought that the juror, in contrast to the judge, is peculiarly subject to bias, the necessary result of respondent's position is to disqualify from sitting in Government cases, at the least, every Federal judge not holding office for life.

II

IF AT COMMON LAW THE CROWN SERVANT WERE A QUALIFIED JUROR IN CROWN CASES, THE SIXTH AMENDMENT DOES NOT FORBID A DISINTERESTED GOVERNMENT EMPLOYEE TO SIT AS JUROR IN GOVERNMENT CASES

The test by which to measure the validity of an act challenged under the Bill of Rights is well established. It has admirably been set forth, in contrast to the other great classes of constitutional provisions, in *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 669:

> Whether a clause in the Constitution is to be restricted by the rules of the English law as they existed when the Constitution was adopted depends upon the terms or the nature of the particular clause in question. Certainly, these rules have no such restrictive effect in respect of any constitutional grant of governmental power (*Waring* v. *Clarke* [5 How. 441], *supra*), though they do, at least in some instances, operate restrictively in respect of clauses of the Constitution which guarantee and safeguard the fundamental rights and liberties of the individual, the best examples of which, perhaps, are the Sixth and Seventh Amendments, which guarantee the right of trial by jury. That guaranty has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements rec-

> ognized in this country and England when the Constitution was adopted.

Thus, neither the Sixth nor the Seventh Amendment prevents modification of the jury system known to common law, so long as its essential characteristics are preserved. *Walker* v. *New Mexico & Southern Pac. R. Co.,* 165 U. S. 593, 596; *Ex parte Peterson,* 253 U. S. 300, 309–310; *Patton* v. *United States,* 281 U. S. 276; *Gasoline Products Co.* v. *Champlin Refining Co.,* 283 U. S. 494, 498.

But if any practice, said to impair the right to a trial by an impartial jury, were recognized at common law at the time of the adoption of the Amendments, the Constitution cannot serve to invalidate it. As this Court said, in *Baltimore & Carolina Line* v. *Redman,* 295 U. S. 654, 660, of the practice of reserving judgment on a motion for directed verdict—

> But whatever may have been its origin or theoretical basis, it undoubtedly was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that Amendment.

See, to the same effect, *Schick* v. *United States,* 195 U. S. 65, 69; *Salinger* v. *United States,* 272 U. S. 542, 548; *Patton* v. *United States,* 281 U. S. 276, 288: *Dimick* v. *Schiedt,* 293 U. S. 474, 476, and, as

to the guaranties of the Fifth and Fourteenth Amendments, *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 277; *Ownbey* v. *Morgan*, 256 U. S. 94, 104–105, 112.

Since the impartial jury secured by the Sixth Amendment is that known to the common law in 1791, the prime inquiry is whether the common law operated to disqualify a juror in a Crown case when he had no interest, personal or official, in its outcome except that which might be ascribed to his employment in an unrelated branch of the Crown service. If, as the Government submits, there was no such disqualification, the Sixth Amendment cannot be taken to invalidate a statute removing such a disqualification.

III

AT COMMON LAW THE KING'S SERVANTS SAT ON JURIES IN CROWN CASES

1. Introduction

By the end of the thirteenth century the common law jury had developed to something like its modern form. *Pollock & Maitland*, History of English Law, II, 609–630, 638. By this time the notion had taken firm root that the jury must stand impartial between the parties. This impartiality was secured by the device of challenges.

The mechanism of the challenge to the jurors seems to have emerged with the beginning of the

jury system.[15] Britton, writing about 1300, mentions a number of grounds of challenge of a juror because of bias. *Britton,* I, 134b–135. Fitzherbert cites, apparently from the manuscript reports, cases of challenge because of possible bias which go back as far as 17 Edw. II (1324). *Abridgment,* Challenge, 168. By the time of Edward III the Year Books contain numerous examples of challenge because of possible bias. The published cases reported during his reign (1327–1377) include about 80 which deal with the challenge of jurors; of these cases approximately 40 deal with challenges based upon the alleged bias of the sheriff or of the jurors, while the remaining cases are divided about equally between those that deal with challenges for causes other than bias and those that relate to the procedure of the challenge. See Indices to Parts 2–5 of *Year Books.* It is abundantly plain that by the last half of the Fourteenth Century the concept of an absolutely impartial jury had become a part of the system of trial by jury and that the challenge had developed into an effective mechanism for securing this impartiality.

The challenge might be directed either to the array or to the polls. If the array were challenged, the only issue was the impartiality of the sheriff

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[15] Even prior to the time the jury was in general use, those who comprised the grand assize or assize of novel disseisin were subject to challenge because of bias. See *Glanville,* Bk. II, c. XII, n. (Beames Ed., 1900, p. 50); *Bracton, De Legibus Angliae,* folio 185a (Twiss Ed., III, 185).

who had selected the jurors. The modern system of selection by lot was not introduced until much later (see p. 50, *infra*), and the impartiality of the sheriff was thus a matter of prime concern. If he were found to be biased, or to stand in close relationship to one of the parties, the entire jury panel was automatically disqualified. The challenge to the polls was based upon the qualifications of the juror himself. The standard classification is that of Lord Coke, who divided the grounds of challenge into four groups: *propter honoris respectum*, to challenge a peer of the realm in the trial of a commoner; *propter defectum*, to challenge for alienage, bondage, or want of a freehold; *propter affectum*, to challenge for partiality or bias; *propter delictum*, to challenge a juror who had been attained or convicted of felony. If found to be disqualified, he was set aside and the next juror on the panel sworn in his place. See, generally, *Coke* on Littleton, I, 156a et seq.; *Hale*, Pleas of the Crown, II, 274, n.; *Tidd*, Practice, II, 851–852; *Blackstone*, Commentaries, III, 358–359.

The challenge *propter affectum*, whether directed to the sheriff or to the juror, took two forms, a challenge in principal and a challenge to the favour. The challenge in principal was based upon the acts, status, or relationship of the juror or sheriff from which favour to the one party or bias against the other party would be so probable that, from early times, there arose an irrebuttable

presumption of disqualification. Examples are kinship to or tenancy under a party, or having an interest in the outcome of the case. The juror or array challenged in principal on such grounds was set aside by the judge. The challenge to the favour was based upon any circumstance whatever which might be thought to make a sheriff or juror partial to the suit of either party. If the bias alleged by the challenger to the favour were denied, either by the sheriff or juryman or the other party, the court appointed "triors" to determine the issue. The triors were the jurors already sworn, if there were so many as two of them, and, if not, two indifferent persons chosen by the judge. See, generally, *Coke* on Littleton, I, 157b; *Hale,* Pleas of the Crown, II, 275, n.; *Bacon,* Abridgment, V, 366; *Stephen,* Commentaries, III, 593–594 (14th Ed.); *Blackstone,* Commentaries, III, 363.

In this rather intricate classification, the difference between the challenge to the array and that to the polls may for present purposes be ignored. Apparently no reported case and no commentator suggests that there may be any difference in the grounds for challenge of the sheriff or the juror.

One of the grounds for disqualifying a sheriff or juror was that he was a servant of one of the parties. The commentators who have discussed this ground of challenge agree that it is a good challenge in principal, operating irrespective of actual partiality, if the sheriff or juror be a servant

of a private party to the suit. *Coke* on Littleton, I, 156a, 157b; *Duncombe,* Trials per Pais, 169; *Viner,* Abridgement, XXI, 229; *Bacon,* Abridgement, V, 343; *Tidd,* Practice, 853; *Chitty,* Criminal Law, I, 537; *Blackstone,* Commentaries, III, 363; *Archbold,* King's Bench Practice, I, 203, 205; *Archbold,* Criminal Practice and Pleading (24th Ed.), 210; *Stephen,* Commentaries, III, 593; *Thompson & Merriam,* Juries, sec. 185; cf. *Britton,* I, 135.

The rule is well founded in reason. The master was generally in intimate and daily contact with his servant. The servant, in turn, of necessity felt his welfare closely bound to that of his master, even in the ordinary affairs of life. These ties would be expected to be drawn much closer when the master is confronted with the catastrophe of a law suit. None can quarrel with the justice of the rule which excludes such a servant from the jury which is to pass judgment on his master's case.

But from this it does not follow that a servant of the King would, because of this fact alone, be unacceptable as a juror in Crown cases. In the first place, he is but one of thousands of employees and has no intimacy of contact with his employer. Second, he is engaged in activities which have no relation to the subject matter of the suit. If chance or design operated a call a juror who did have an official or personal interest in the subject

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matter he should, of course, be subject to challenge for bias. Third, the Crown resources are such that no employee could fear that loss of the suit would have an adverse effect upon his own position. See *Watson* v. *North British Ry. Co.*, 30 Scot. Law Rep. 252 (Ct. of Sess., 1901) where the ordinary rule was held inapplicable to a juror who was one of 18,500 employees of the defendant.

There is, in common with the case of private employment, only the possibility that the employer through threat of discharge might coerce a decision in his favour. It needs no elaboration to demonstrate that this danger is illusory. It could arise only if the entire Government (by hypothesis, any member of the prosecuting branch would be subject to challenge for bias) were engaged in a systematic attempt to prostitute the course of justice.

In apparent accord with our view that the rule as to private parties has no reason when the employer is the government, every text and every case which dealt with the subject prior to the adoption of the Federal Constitution agrees that the disqualification attaching to a servant of a private party did not apply to a servant of the King.[16] Our

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[16] In the material which follows we shall discuss only the Government employee. If he is a qualified juror in a Government case, it follows *a fortiori* that the juror who receives a pension from the Government is not disqualified. The employee's contact with the Government is daily and intimate; the pensioner's is periodic and distant. Except in the case of a pension holder who is incapacitated and who

analysis of the problem and of the authorities leads to the conclusions: (1) there was no absolute disqualification, and neither sheriff nor juror could be challenged in principal because he was a servant of the King; but (2) in the case of *actual* partiality to the Crown, or malice toward the other party, the sheriff or juror was disqualified, and was therefore subject to challenge to the favor. The authorities do not fit into this scheme with complete precision, but there is none which denies the general proposition that the challenge based upon employment by a party is inapplicable to the servant of the Crown.

2. The Comment

The first great commentator to write after the development of the jury system was Fitzherbert,[17] whose abridgment was first published in 1516.

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has no means of support but his pension, the financial dependence on the Government is plainly much more in the case of the employee.

We recognize that at common law the recipients of certain crown pensions were exempt from jury service by virtue of an ancient privilege. *Blagney's Case*, Cas. T. Hard, 202, 95 Eng. Rept. 129. But this exemption was a personal privilege and was not a disqualification or a ground of challenge. *Viner*, Abridgement, XXI, 210–213 and cases cited.

[17] His writing, as that of Brooke, Rolle, Bacon, and Viner, is in the form of an abridgment of decided cases into a summary statement of the proposition of law. Since the result seems as much creative as reportorial, we have followed the customary practice of treating these men as authors rather than reporters.

His statement is quite explicit that there can be no principal challenge, but only one to the favour (requiring actual bias), because a juror in a Crown case is a servant of the King. Thus, summarizing an unpublished case in 3 Henry VI, he states:[18]

> In quare impedit by the King against an abbot, and an abbot A. defaulted and A. appeared and was at issue against the King and challenged a juror because he was of the King's livery and all the court held that this was not a principal challenge but he must conclude with the words "and he is thus favorable."

Again, when dealing with challenges generally, rather than as either in principal or to the favour, he states:[19]

> An office found was traversed and the inquest appeared and the array was challenged because the Sheriff favored the King more than the party and this was held to be of no significance for he should do so by reason of his obedience but some say that it is a good challenge that the Sheriff had been Valet of the King's crown or a similar especially menial [spelt 'manual'] servant.

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[18] *Fitzherbert*, Abridgment, Challenge, Sec. 17, folio 172 (1577 Ed.).

The translation of passages from the commentators (and from *King* v. *Jenney*, *infra*) available only in the Norman French is by Mr. Malcolm S. Mason of the School of Law of Columbia University.

[19] Challenge, Sec. 63, citing an unpublished case in 22 Edw. IV.

This paragraph has led to much difficulty with some of the later commentators, as is shown below, because of Fitzherbert's failure to make explicit that the exception of the menial servant was a challenge to the favour. This is made plain by a later passage where he says that there can be *no* general, or principal, challenge for favor to the King.[20]

Chief Justice Brooke, in his Abridgment, relies on two cases in the time of Henry VII, to establish that one cannot have a challenge to a juror because he is a servant of or favorable to the King.[21]

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[20] Challenge, Sec. 65. A translation follows:

On an information the array was challenged by the King because it was favorably made and all the judges of both courts agreed that this challenge lies well enough and it was therefore tried and found against the King. Bryan: where the King is party the party cannot challenge the inquest generally but especially, for example on the ground that the Sheriff is his adversary and in this matter which Haught. conceded etcetera.

[21] *Brooke*, Abridgment, Challenge, folio 126, Secs. 154, 155. A translation follows:

154. Traverse against the King was at issue and the King challenged on the ground that the Sheriff who made the panel was related to the plaintiff and this was allowed as a good challenge. However, it was said that one shall not have a challenge against the King on the ground that a juror is a servant or favorable to the King. * * * 4 Hen. 7. 2. [Correct citation: 4 Henry VII 3, H. pl. 5.]

155. Issue between the King and the party for breach of the peace and the array was challenged by the King because it was favorably made at the nomination of the defendant and it was agreed that

Staunforde is unmistakably clear that a servant of the King could not be challenged, in principal, for this reason alone, but that the challenge must be to the favor, requiring actual bias to be proved. He states: [22]

> And as the King may challenge against the party, so may the party challenge against the King as appears under the title Challenge in Fitzherbert P. 16 and P. 17, P. 3 Hen. 6, where a juror was challenged because he was of the King's livery. But it was held by the whole court that this was no principal challenge but a challenge for favor, and he must end his challenge with the words, "and he is thus favorable", and with that agrees P. 63 M. 22 Edw. 4, and P. 129, where the array was challenged and quashed although the King was a party. * * *.

Lord Coke's treatment of the subject (*Coke* on Littleton, I, 156a) is clear only on the proposition that challenges to the sheriff or a juror against the King were not on the same footing as those against a private party. His discussion of the grounds of a challenge in principal, which include the objection that the sheriff is the servant of a party, is plainly meant to be inapplicable to the case where

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the King could have this challenge and he could challenge the polls for favor, which note, but one will not have a challenge against the King. * * *

[22] *Staunforde*, Pleas of the Crown, 162.

the government was the employer.[23] These challenges in principal are, however, treated together with those for favour to the King. Coke states (I, 156a):

> But where the king is partie, one shall not challenge the array for favour, &c. because in respect of his allegiance he ought to favour the king more. But if the sherife be a vadalect [valet] of the crowne, or other meniall servant of the king, there the challenge is good.

In view of the references to this passage which are found in the discussion of the challenge in principal, Coke must have meant that the servant of the king could be challenged neither in principal nor to the favour, unless he were in personal waiting to the king, and so as likely as the servant of a private party to be partial; the challenge presumably would then be to the favour.[24]

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[23] The text reads: "and where the array shall be challenged against the king, you shall read in our books." Again, still dealing with challenges in principal, he states: "And when the king is partie * * * he that traverseth may challenge the array, as hereafter in this Section shall appeare."

[24] Hargrave's annotation to this passage takes the view that Coke's exception to the general rule is best to be explained on the ground that challenges against the king were challenges in principal. *Coke*, on Littleton, I 156a–156b, n. 281. This seems absurd, since a challenge in principal would obviously make unnecessary any discussion of a chal-

Lord Hale is of the same view, save that he makes provision for a challenge to the favour, involving an inquiry as to actual bias, in all Crown cases where a juror is a servant of the King. He states (*Hale,* Pleas of the Crown, II, 271):

> Challenges by the prisoner for cause shewn are of two kinds, *viz:* Either to the array or to the poll, but it is no principal challenge either to the array or poll, that the sheriff or juror is of the king's livery, but he must conclude to the favour. *3 H. 6. Challenge 17.*

Chief Justice Rolle, whose Abridgments were compiled some time prior to the Revolution of 1649, seems to have gathered together virtually all of the summary statements regarding challenges against the King which were then to be found. *Rolle,* Abridgment, II, 645–646. In his hands, or those of his predecessors, the propositions have been overcompressed, with the result that they are not entirely consistent. But it is plain that there may be a challenge for actual favor.[25] And it is also

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lenge to the favour, and seems also to be contradicted by the text. Moreover, the passage is a paraphrase of Fitzherbert, who elsewhere is quite explicit that there can be no challenge in principal.

[25] A translation of those paragraphs follows:

VII. If there is issue between the King and another on a presentment that he had committed a nuisance to London

plain that the fact that the juror is a Crown servant does not of itself constitute a ground of challenge in principal. Referring to Fitzherbert and the case in 3 Henry VI, Rolle says:[26]

> X. In a quare impedit by the King against J. S. if they are at issue it is no principal challenge to a juror on behalf of the defendant that the juror was of the King's livery, but his challenge must end with these words "and he is thus favorable." 3 Hen. 6, Challenge 17.

Since this much is clear, it is immaterial that Rolle, naturally enough, shows some contradiction when he deals in wholly general terms with challenges against the King, failing to consider the source of the alleged favour or the nature of the challenge.[27]

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and other of the King's people, the defendant may challenge a juror because he was one of the presentors.

VIII. An array was quashed because it had been made by the Sheriff in favor of the King who was plaintiff in the action. Mich. 2 Hen. 4, B. R. Rot. 30.

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XI. On an issue between the King and another it is a good challenge that the Sheriff was valet of the King's crown or a similar menial servant. 22 Edw. 4, challenge 63.

[26] Translation.

[27] A translation of these passages follows:

I. Where the King is party to an issue there can be no challenge to the array. 38 ass. 19.

II. Formerly in issues where the King was a party a challenge could be taken to the array or to the polls without showing cause. Temp. Edw. I. 83.

III. But it is otherwise today. Temp. Edw. I. 83. (Given to be approved by King and Council. See the statute in

Giles Duncombe, in 1665, wrote *Trials per Pais,* a classic text on jury trials. (Citations are to the 9th Edition, 1793.) He repeats (p. 175), almost *verbatim,* Coke's discussion, quoted above. At another place he states (p. 189):

> In an action betwixt the king and a party, the subject cannot take any challenge for favour, as in an indictment for barretry, &c., the defendant cannot challenge a juror for favour to the king. *Ibid* [*Rolle,* Abridgment, Trial, 654], pl. 1, 2.

However, he elsewhere states that the subject, even where the King is a party, may challenge the array (pp. 166–167) or the polls (p. 196). He also says (p. 203) that, while a challenge for favour to the King is bad, a challenge for malice against the defendant in a Crown case is good. Finally, he summarizes a case (*Anonymous,* 1 Vent. 309, 3 Salk. 81) where a juror was successfully challenged for favour to the prosecutor. Since it follows *a fortiori* from the statement against challenges for favour to the king that there can be none in principal, Duncombe seems to align himself with Coke

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Magna Charta, folio 132, called Ordinatio de inquisitionibus.)

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VI. Where the King is a party to an issue the other may nevertheless have a principal challenge. Contra 19 ass. 6.

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IX. But it is no challenge to the array that the Sheriff favors the King more than the party, for he ought to do this by reason of his obedience. 22 Edw. 4, challenge 63.

in denying any challenge save one to the favour in exceptional circumstances. It is reasonable to assume that these exceptional circumstances would include any case of actual bias.

Hawkins reflects the confusion of thought which seems to have stemmed from Coke's position that in some but not all cases there could be a challenge to the favour. He states, *Hawkins,* Pleas of the Crown, II, c. 43, secs. 32, 33:

> It is said, That the subject cannot take a challenge for the favour against the king, because every one is bound by his allegiance to favour the king. But if no more be meant by these books, than that such a challenge is not good without shewing some actual partiality in such sheriff or juror, or some particular cause in respect whereof the king may influence them, it seems not clearly settled how the king in this respect hath a greater privilege than the subject, which yet it seems agreed that he hath.
>
> It hath been said to be no principal challenge where the king is a party, that a juror is of the king's livery, or his immediate tenant; but it is said, That a challenge for such cause ought to conclude to the favour. But these matters seeming to be unsettled, I shall leave them to be farther considered by others. * * *

Hawkins' difficulty in reconciling the special status of jurors or sheriffs said to favor the King with

their liability to challenge in cases of actual partiality seems plainly a result of his failure to consider that a challenge in principal, good against the servant of a private party, could be no more than a challenge to the favour, requiring actual bias, when the King was the employer.

Mathew Bacon in his Abridgement sets forth a close paraphrase of Hawkins' discussion of this problem, and the preceding paragraph is fully applicable to his treatment. *Bacon,* Abridgment, V, Juries, 355.

Viner, relying on the same authorities as did Coke, makes a clearer analysis than did Coke, and, at least by implication, uses the cases for the propositions that, while a challenge to the favour will lie against the king, "it is not any principal challenge to a *juror* for the defendant that he *was of the livery of the king.*" *Viner,* Abridgments, XXI, Trial, 243 (Viner's italics).

Hargrave, in his annotation to the thirteenth (1787) edition of *Coke* on Littleton, I, 156a–156b, expresses dissatisfaction with the reason assigned by Coke (see p. 31, *supra*). He adds:

> But a better principle to found the rule upon was not unobvious; namely, that from the extensive variety of the king's connections with his subjects through tenures and offices, if *favour* to him was to prevail as an exception to a juror, it might lead to an

> infinitude of objections, and so operate as a serious obstruction to justice in suits in which he is a party.

It is also of interest to note that Hargrave states:

> Also the practice since Lord Hale's time seems to have accorded with his doctrine, there being subsequent instances in print in which such an exception when taken to the polls has been disallowed, but not one I believe of its being received.

Chitty, writing in 1816, reads Coke's statement (see p. 31, *supra*) to mean that there can be *no* challenge for favour to the King, and ignores the exceptions specified by Coke in the following sentence. His discussion (*Chitty,* Criminal Law, I, 539) reads:

> It has been said that no challenge to the favor can be allowed against the king, and the reason assigned is, that the duty of allegiance must be supposed to induce a preference for him, which might defeat every panel (i); but this seems to be very subtle, and, in capital cases, at least, unfounded (k).
>
> (i) Co. Lit. 156, a.
> (k) 2 Hale, 271. Co. Lit. 156, a. n. 4.

To demonstrate error in Coke's formulation Chitty apparently uses Coke's exceptions and Hale's statement that there could be a challenge to the favour if the juror were a Crown servant without noting Hale's express and Coke's implied state-

ment that there could be no challenge in principal. Since he relies only on Coke and Hale, it is not thought that his silence as to challenges in principal amounts to a view that there could be such a challenge, good, irrespective of actual bias.

It is believed that the authorities which have been quoted above include every prominent commentator who wrote prior to or shortly after the adoption of the Federal Constitution and who considered, expressly or by implication, the extent to which the challenge to a servant of one of the parties was applicable to a servant of the Crown. They are in complete agreement that such a challenge was only partially applicable. Coke, and those who followed him, appear to have thought that there could be a challenge to the favour in some but not all cases. His position excludes, *a fortiori,* a challenge in principal. Hale, and those who followed him, thought there could always be a challenge to the favour, although never a challenge in principal. Since the Government's position is fully supported by the single doctrine that there could be no challenge in principal, it is immaterial whether Hale or Coke correctly portrayed the common law rule as to challenges for favour to the King.

3. The Cases

Most of the Year Book cases cited by the commentators appear not to have been published, but those which are available indicate a general under-

standing on the part of the bench and the bar that the ordinary disqualifications of sheriffs and jurors were as a rule inapplicable to challenges against the King. Thus, as early as 1346 counsel for the King remarks as a matter of course that none can challenge the jurors against the King, and the court qualifies this statement by an illustration of a case in which the juror would be expected to be subject to actual bias.[28] Y. B., 19 Ass. 62, pl. 6.

By the time of Henry VII the special standing of the King with respect to challenges for favour to him had become so well established that ingenious counsel sought to use it as a premise by which to prevent challenges on the part of the King. The court recognized the premise but refused to admit

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[28] The action was on the presentment of a grand jury that the defendant interfered with navigation on the Thames, constituting a nuisance to the city of London. A translation of the relevant portion of the case follows:

> Then Pole took a challenge to the array, on the ground that it was drawn by the sheriff of Middlesex who is a deputy of and removable by the municipality of London which is a principal party. And it was overruled, since this case arises on a grand jury's presentment, to which the King is party. Green [King's Serjeant] said that when the King is the sole party one will not have a challenge to the jurors. However in this case it was said that one might have a challenge that a person who is a member of the panel was a member of the grand jury, and thus to challenge a member of the petit jury.

The translation of the Year Book cases is by Mr. Irwin L. Langbein, Attorney, Securities and Exchange Commission.

the conclusion. Y. B., 4 Henry VII 8, P. pl. 7.[29] Another counsel in the preceding term, had with equal lack of success sought to make the same argument.[30] Y. B., 4 Renry VII 3, H. pl. 5.

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[29] A translation of the relevant portion of the case follows:

> * * * And then the King's sergeants challenged the array, and said that the panel was favorably drawn at the instance of the defendant and that the sheriff drew it through favor, etc. And the opposing attorney entered the formal denial, "Well and duly drawn." Vavisor [counsel] said that there should be no trial of the issue of empanelment, since the issue was not well joined. Challenge for favor lies no more on behalf of the king than it does against the King. Keble [King's Sergent] said that the triors might try this challenge, and if they should find "well and duly drawn" then it would be without doubt. * * * And the justices of King's Bench inquired of the justices of Common Pleas, and they said that the King could so challenge, and the challenge was so tried, and the array was found well drawn. And thereafter the King's sergeants challenged individual jurors for favor. But the party will have no challenge against the king, etc.

[30] A translation of the relevant portion of the case follows:

> A challenge was taken on behalf of the King against a person who offered a traverse against the King. And the King showed that the sheriff who drew the panel was a relative of the man who offered the traverse, etc. And it was said that this challenge would not lie on behalf of the King any more than against the King, *for it is not a challenge against the King to assert that one of the jurors is his servant or favorable to him*, and hence it is not a challenge on behalf of the King to say that the sheriff is a relative of the party. And nevertheless a challenge was

Perhaps the most conclusive evidence of the inapplicability against the King of the ordinary grounds of challenge is that the very writ under which the jury was summoned differed according as the case was between private parties or was one to which the King was a party. In *King* v. *Jenney*, Keilw. 97, 72 Eng. Rpt. 261 (1509), the reporter states: [31]

> And in this case it was said by Reade [Chief Justice] that it was not a principal challenge where the King is a party to say that the sheriff of the juror is the King's tenant. It is otherwise in the case of a common person and in the venire facias among common persons the words of the writ are "and who should be related to neither the plaintiff nor the defendant." But where the King is party the writ will never have these words.

However, it seems reasonably clear that actual partiality could be used as a basis of challenge against the King, and that the recognized immunity of the Government from the rules applicable to private parties was not allowed to work in-

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admitted on behalf of the King against the party. * * * (Italics added.)

It is interesting that a century later counsel again urged a variety of this argument which again was rejected. *Hunsdon* v. *Baker*, Cro. Eliz. 663 (Q. B., 1599).

[31] Translation.

justice.[32] In *Rex* v. *Gonney,* Keilw. 102a, 72 Eng. Rpt. 266 (K. B., 1508) the defendant challenged the array because the sheriff bore malice against him as a result of a pending action of trespass brought by the defendant against the sheriff. The court held the challenge to be good, for, although it was no challenge that the juror was a tenant of or favorable to the King, it was a good challenge that the sheriff or juror bore malice to the defendant.[33] See also *Reg.* v. *Blakeman,* 3 Carr. & Kir. 97, 175 Engl. Rpt. 479 (Assize, 1850); cf. *Rex.* v. *Sheppard,* 1 Leach C. C. 101 (O. B., 1773). These cases are cast in terms of a challenge because of malice toward the defendant. But the challenge against the King could also be made because of special favor to him. Thus, in the trial of an information of forgery a juror was successfully

[32] An observation by Holt, C. J., when a juror was challenged in a libel prosecution because he had already formed an opinion against the writings, might be considered a possible exception. In the discussion as to the procedure the Lord Chief Justice stated that "it must be a principal challenge or nothing; for there can be no challenge to favour in the case of the crown." *Reg.* v. *Tutchin,* 14 St. Tr. 1095, 1101 (1816 Ed.). This proposition is supported neither by authority nor by reason, and Holt, in the absence of opportunity to consult authorities, must have erred in his recollection of the general doctrine that challenges against the king were a special case.

[33] Keilwey's report of the case leaves it unclear whether the proposition paraphrased in the text is his own statement or that of the court. The latter is improbable, since in that event the report would include no mention of the court's decision.

challenged because he had lately entertained the prosecutor in his house; "this was admitted to the favour, tho' against the King." *Anonymous*, 1 Vent. 309, 3 Salk. 81, 86 Eng. Rpt. 199 (K. B., 1678).

The precise question is whether a Crown servant could for that reason alone be challenged by the private party in a Crown case when the servant's position was such as to contain no implication of actual bias. The later reports appear to contain two cases decided prior to the adoption of the Federal Constitution and four decided shortly thereafter which bear upon the problem. They are unanimous, by holding or indication, that such a challenge did not lie.

In *Rex* v. *Hampden*, 9 St. Tr. 1054, 1057–1061 (K. B., 1683) the defendant challenged two jurors in that one was a servant in the King's Forest and the other a sergeant of arms attending his Majesty. Although the Attorney General subsequently consented that they stand by, and sufficient jurors were obtained without them, the challenge was disallowed. Excerpts from the colloquy between the court and counsel include the following:[34]

> Mr. *Jones*. If all that receive Salary, or Wages from the King, are not to be Jurymen in the King's Causes, then all the Dep-

[34] Counsel for the defendant, in the colloquy not quoted, understood Coke's exception of menial servants of the king (see p. 31, *supra*) to embrace the defendants. Jeffreys apparently was of the same view but thought Coke wrong.

uty Lieutenants and Militia Officers, which generally are the most substantially Freeholders, are excluded from being Jurymen.

Mr. Just. *Withins.* Who will say so, Mr. *Jones?* No Lawyer in *England* surely will say so.

* * * * *

L. C. J. [Jeffreys] Mr. Attorney, I do debate it for Learning sake, truly I know not the Man, nor whether he be the King's Servant, or not, but I speak against allowing the Challenge, that if he be set aside, it may not be taken as a Precedent, and so pass for Law that the King's Servants can't be Jurymen. I would have you quit the Man by Consent, but not as a Forceput, as tho' the Law were so, for the Law, I think, is otherwise.

* * * * *

Mr. Att. Gen. He may be a Juryman by Law sure.

L. C. J. There is no doubt of it, Mr. *Attorney.*

In *Rex* v. *Parkyns,* 13 St. Tr. 163 (O. B., 1695), more respectable authority is found. Holt was Lord Chief Justice and the time was after the Revolution of 1688. In a treason trial the defendant, in reckoning the peremptory challenges allowed to him, argued that two had been for cause, in that the jurors had been servants of the King. Holt stated "that is no cause of challenge." As counsel for the King did not insist Holt allowed the jurors to be set aside, say-

ing "but I would not have it for a precedent."

The King's Bench of Ireland in *Rex* v. *Rowan,* 22 St. Tr. 1034, 1037–1039 (1793), similarly held this to be no ground for challenge. The report of the case states:

> Upon calling over the jury, John Read was objected to, as holding a place under the crown, but the attorney-general insisting upon the illegality of the objection, and observing that it went against all that was honourable and respectable in the land, it was over-ruled by the court.

In *Rex* v. *Kirwan,* 31 St. Tr. 543 (K. B., Ire., 1812), the court was faced with a challenge to a grand juror because he held office under the Crown, removable at pleasure. Two justices held that a grand juror was not subject to challenge (pp. 566–569, 572–574) and therefore did not pass upon the ground of the challenge. But Mr. Justice Day was of opinion that a grand juror could be challenged and therefore considered the ground. He said (p. 572):

> * * * Lord Holt, who was a great constitutional lawyer, denied the right of making such a challenge to a petit juror, even where a man was upon trial for his life; *a multo fortiori,* the objection cannot lie to a grand juror, who only accuses the prisoner and sends him to trial. What could be more revolting, or monstrous than to say, where the crown was not personally, but in its po-

> litical character concerned, that it had an interest in the accusation of innocence?

The King's Bench in *The King* v. *Edmonds,* 4 B. & Ald. 471, 106 Eng. Rpt. 1009 (1821) gave a rather extended consideration to the subject of challenges. The case was appealed from *nisi prius,* the defendant urging that the Master of the Crown Office who drew the special jury was biased and that his challenge to the array should have been sustained. The court held that he could not be challenged, because he was an officer of the court. It added (pp. 483–484):

> * * * Indeed, it stands as a matter of doubt in the books, whether any challenge to the array, which operates only as a challenge to the favour, like the present, can be taken against the Crown. This being doubtful, I place no reliance upon it. * * *

As the court stated the general proposition, including cases of actual bias, it was indeed doubtful. But, in considering whether the presence of justices of the peace on the jury evidenced partiality on the part of the Master of the Crown Office, the court made it plain that crown service did not of itself disqualify a juror in a crown case. It said (pp. 487–488):

> The third ground of complaint was, that the officer named several gentlemen acting under the commission of the peace for the county. It was said that those gentlemen must be supposed not to be unindifferent be-

> tween the Crown and the defendants, upon this, which was termed a political prosecution, because they hold their office at the pleasure of the Crown. * * * It is true, indeed, that justices of the peace hold their office at the pleasure of the Crown, but they hold a laborious and burthensome, and not a profitable office; and it is really a gross calumny upon a class of persons, to whom the nation is most peculiarly indebted for valuable and gratuitous services, to suppose that they will not act impartially between the King and his people. If gentlemen of this description should be returned by the sheriff, no challenge could be taken to them individually, as a challenge to the polls, on the ground of their office; it has been the constant practice, to name some gentlemen of this class on special juries, or rather no one has ever thought of omitting them on the nomination. * * *

Although decided by the Central Criminal Court in 1848, *Regina* v. *Lacey*, 3 Cox Cr. C. 517, 519, is some evidence that the common law rule has not lost its vitality. In this trial, for treasonable felony, the following colloquy is reported:

> *Ballantine* then challenged John Pickworth, "for that the said J. P. does not stand indifferent between the crown and the prisoner." * * *
>
> The juryman was then sworn, and was asked by *Ballantine* the following question: "During the recent disturbances, have you acted as a special constable?"

The Attorney-General objected to this question as being one totally irrelevant.

PLATT, B. It is a question which has nothing whatever to do with the issue, and I cannot allow it to be put.

Finally, in *Watson* v. *North British Railway Co.*, 38 Scot. Law Rep. 252 (Ct. of Sess., 1901), each of the Lords reasoned that one of the 18,500 employees of the Railway, who was not connected with any activity relating to the cause of action, was so unlikely to be interested in the outcome of the suit that, when the status of the juror was first known after verdict, there was no occasion for a new trial. The reasoning, of course, applies *a fortiori* to the case of the Government.

There appears to be no later indication of the contemporary English doctrine. Since the practice of challenging jurors has fallen into almost complete disuse in England,[35] and since there has been no statutory change, there can be small doubt but that the Crown servant is still eligible to serve as a juror in a Crown case.

The evidence of the practice in the other common law jurisdictions might serve to indicate the common law doctrine, but it is fragmentary in the

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[35] Departmental Committee, *Report on Jury Law and Practice*, 1913, Cd. 6817, pp. 24, 66, 67, 78, 84, 129; *Lawson and Keedy*, Criminal Procedure in England, 1 Journ. Crim. Law and Criminology 595, 609; *Sunderland*, Modern English Legal Practice, 4 Texas Law Rev. 273, 287.

extreme. The only definite indication which we have been able to find is the statement in regard to the South African statutes, found in *Nathan*, Common Law of South Africa (1907), IV, sec. 2753, that—

> * * * The prosecutor, or the prisoner, may challenge and set aside any number of jurors for any of the following causes * * * (3) in the Cape Colony and Natal, favor to the prisoner, or to the private prosecutor, or to the party who, if the public prosecutor had not prosecuted, would have been entitled to prosecute * * * (Cape, R. 47; * * * Natal Law 10, 1871, § 26.)

The implication is plain that the relationships causing favor are intended by this statute to be limited to the individuals figuring in convictions sought by the government and not to include any relationship to the government itself.[36]

4. The Case of the Sheriff

Finally, there is to be mentioned one circumstance which, even were the texts and the cases

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[36] Still more remote evidence is found in *Hamilton & Addison*, Criminal Law and Procedure, 762, 767. In commenting on the New South Wales Jury Act of 1912 the authors rely upon *Rex* v. *Edmonds*, 4 B. & Ald. 471, and *Coke* on Littleton (see pp. 46–47, 30–31, *supra*) for the procedure of the challenge and the classification of the challenges for cause. By rather attenuated implication, these references may be taken to indicate that the rule of these authorities that a challenge may not be taken merely because the juror is a Government employee obtains as well in New South Wales.

silent, would seem to be conclusive evidence that at common law employment by the government does not of itself raise a presumption of bias. Throughout the long period between the origin of the jury trial and the adoption of the Federal Constitution challenges had been directed either to the sheriff or to the juror. For the impartiality of the sheriff was fully as important as that of the juror. He chose the jury panel not by lot but with full powers of selection; not until 1825 was selection by lot provided for in civil cases (6 Geo. IV. c. 50, sec. 26) and it has not yet been made compulsory in criminal cases.[37] No commentator and no case has been found which suggests that the sheriff is at common law any the less subject to challenge than is the juror.

The sheriff from the earliest times until the present has been an officer of the crown. *Maitland,* Constitutional History of England, 40–41, 207, 234, 485; *Stubbs,* Constitutional History of England (2d Ed.) II, 206–208. In the words of Pollock and Maitland (History of English Law, I, 519), the sheriff is "a distinctively royal officer, appointed by the King, dismissible at a moment's notice, strictly accountable to the King's Exchequer."

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[37] Hailsham's Edition (1935) of Halsbury's Laws of England, XIX, 302, states that the Criminal Code Bill Commission has recommended the enactment of such a provision and that, as a matter of practice, it is customary to select jurors by lot.

If the common law raised an absolute disqualification against the king's servant in a crown case, it must follow as a general proposition that the array has been illegally constituted in every crown case from 1300 until the present day.[38] The reports and the commentators contain no hint that any litigant has ever had the hardihood to present a challenge which contemplated such an absurd result. Yet, unless the respondent can show a distinction between the challenge to the array and that to the polls, such is the necessary consequence of his position that employment by the Government worked an absolute disqualification at common law, irrespective of actual bias.

5. American Views as to the Common Law

The practice in the colonies prior to the adoption of the federal constitution apparently cannot be ascertained. We have searched the available reports and authorities without finding anything of relevance. Accordingly, in order to determine the view of the American authorities as to the common law rule, it is necessary to rely upon decisions subsequent to the adoption of the Sixth Amendment.

The Government recognizes that *Crawford* v. *United States,* 212 U. S. 183, 195–196, may be taken to be a decision that at common law the Government employee was disqualified to serve as a juror

[38] See *Fitzherbert*, Abridgment, Challenge, sec. 129, folio 175, that the panel must under all circumstances be drawn by a Crown officer.

in a Government case.[39] The Court held that sections 215 and 217 of the District of Columbia Code did not exclude the common law disqualifications, that at common law the servant was disqualified to serve as a juror in a case to which his master was a party, and that this rule disqualified a druggist, receiving compensation for operation of a subpostal station, in a prosecution for fraud of the Post Office Department.

The only case cited by Mr. Justice Peckham on this point is *Block* v. *State,* 100 Ind. 357, 362. This case, it is true, involves a challenge because of employment by the Government. But the juror in that case was a deputy prosecuting attorney serving under the prosecutor who tried the case. The Indiana court viewed the challenge as the equivalent of the old challenge to the favor (see pp. 361–362). The disqualification was plainly one of actual bias and the Government has no doubt that a challenge in such a case would be good both at common law and under the Act of August 22, 1935. *Block* v. *State,* then, is not authority for a disqualification of *all* Government employees. This Court in the *Crawford* case was dealing with a juror who was employed by the Department alleged to have been defrauded, and it is improbable that it, any

[39] The Crawford case was followed in *United States* v. *Griffith,* 55 App. D. C. 123, 2 F. (2d) 925, where a former Government clerk receiving disability compensation was held disqualified.

more than the Indiana court, intended to rule that a Government employee was disqualified to serve as a juror in a Government case in which he had not the remotest personal or official interest.[40]

In any event, it is certain that the decision in the *Crawford* case was not made in the light of the established common law doctrine that the Crown servant was not, for this reason alone, disqualified to serve as a juror. To establish the common law doctrine Mr. Justice Peckham cited only Blackstone (Cooley's) 4th Ed., p. 363 and *Block* v. *State, supra.* Blackstone speaks only of the general disqualification of the servant of a private party and does not consider the special status of the Crown servant. *Block* v. *State* is equally silent as to any different rule in the case of the Government employee, and cites (pp. 362–263) as authorities only those cases and passages from commentators which deal with the employees of private parties.

In the briefs filed with this Court in the *Crawford* case the petitioner's argument to establish the common law doctrine relied exclusively upon cases and authorities directed toward the disqualification of servants of private parties (see Br. for

[40] It is interesting to note that two jurors in the *Crawford* case had business relations with the Government, and were sworn over the objection of the defendant. No. 92, October Term, 1908, R. 77–78. Since this was not assigned as error in the appellate courts, the Government does not argue that their standing as jurors was approved by this Court.

Pet., No. 92, October Term, 1908, pp. 28–33). The Government did not challenge the common law doctrine asserted by the petitioner,[41] but relied instead on the District of Columbia Code as superseding the common law (see Brief for United States, No. 92, October Term, 1908, pp. 10–15).

It results that the *Crawford* case was decided wholly without consideration of the common law rule as to challenges of the Crown servant. The Government does not believe that the decision establishes or has reference to an absolute disqualification of Government employees, such as to exclude jurors who have no possible personal or official interest in the cause. But if the decision should be construed as a declaration of the common law rule as to the Crown servant, it is respectfully requested that the Court reexamine the question.

The other cases dealing with challenges to jurors who are public employees seem uniformly to have been decided cursorily, with no attempt to ground the decision on the English common law and, ordinarily, with but slightly more effort to explain the basis of the decision. However, the fact of the decision alone may be said to be fairly persuasive

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[41] The brief (p. 11) does contain one sentence which asks the rhetorical question whether a civil employee of the United States is the "servant" contemplated by common law. The question is not amplified and relies on no authority.

evidence of the common law doctrine.[42] This is the case whether they were decided wholly without aid of statute, or on the theory that the statutory exemption is a personal exemption and not a disqualification. Three of the cases cited below[43] dealt with statutes expressly declaring the public official to be qualified, and thus by implication adjudge that there has been no denial of an impartial jury, secured by the constitution of every State (*Hayes* v. *Missouri,* 120 U. S. 68, 69).

So far as we have been able to ascertain, the public official has been held a partial juror only when he was employed as a deputy of the prosecuting attorney, *Block* v. *State, supra,* or as a deputy sheriff, *Zimmerman* v. *State,* 115 Ind. 129, 130; *Gaff* v. *State,* 155 Ind. 277; *State* v. *Golubski,* 45 S. W. (2d) 873 (Mo. App.); cf. *Chapman* v. *State,* 66 Tex. Crim. App. 489, 491. The Government thinks these decisions sound, in that the officers would seem to be subject to challenge for actual bias because of their connection with the

[42] In six cases the public officer has been expressly disqualified by statute from serving as a juror. These relate to deputy sheriffs, *Robinson* v. *Territory of Oklahoma,* 148 Fed. 830 (C. C. A. 8th); *Cawthon* v. *State,* 115 Fla. 801; *State* v. *Johnson,* 123 S. C. 50, 53–54, justices of the peace, *Terrell* v. *State,* 69 Ark. 449; *Hankins* v. *State,* 118 Ark. 419, 420–421, and a county commissioner, *Ladd* v. *State,* 17 Fla. 215. These are omitted from consideration, since they do not raise the common law question.

[43] *Hankins* v. *State,* 118 Ark. 419; *Corley* v. *State,* 162 Ark. 178; *State* v. *Petit,* 119 La. 1013.

prosecuting and law enforcement branches of the Government. However, the fact that the majority rule permits deputy sheriffs to serve as jurors in criminal prosecutions in doubly persuasive evidence that public employment is not commonly held inconsistent with the common law, or the constitutional requirement of impartiality, in cases in which the state is a party. *Pate* v. *State,* 158 Ala. 1, 3; *Territory* v. *Fukunga,* 30 Haw. 697, 703; *Spittorff* v. *State,* 108 Ind. 171, 172; *State* v. *Forbes,* 111 La. 473; *State* v. *Petit,* 119 La. 1013; *State* v. *Morgan,* 147 La. 205, certiorari denied, 253 U. S. 498; *State* v. *Foster,* 150 La. 971, 985–986; *State* v. *Lewis,* 50 Nev. 212; *Burns* v. *State,* 12 Tex. Ct. App. 269; *Edgar* v. *State,* 59 Tex. Cr. App. 252, 253–254; *Mingo* v. *State,* 61 Tex. Cr. App. 14, 15; *Young* v. *State,* 91 Tex. Cr. App. 511; *State* v. *Parker,* 104 Vt. 494. Cf. *McNish* v. *State,* 47 Fla. 69; *Coats* v. *State,* 32 P. (2d) 955, 958 (Okla. Cr. App.).

A variety of other public officers[44] have been challenged as jurors in cases where the state is a party and have been held qualified by the highest court of the state. Their positions include that of a reserve officer in the military service of the United States, *Falter* v. *United States,* 23 F. (2d) 420, 425, certiorari denied, 277 U. S. 590; a state

[44] The officers in many of the cases are county or municipal officials. We have made no distinction on this ground, since the county or municipality is merely a political subdivision of the state.

senator, *State* v. *Galbraith*, 150 Wash. 664; municipal officials, *Thompson* v. *Commonwealth*, 88 Va. 45, 46; *Corley* v. *State*, 162 Ark. 178, 181; town constables, *State* v. *Carter*, 106 La. 407; *State* v. *Petit*, 119 La. 1013, *Fellows's Case*, 5 Me. 333, 334–335; *State* v. *Cosgrove*, 16 R. I. 411; justices of the peace, *People* v. *Lange*, 90 Mich. 454, 455; *Evans* v. *State*, 13 Ga. App. 700 (though disqualified where he issued a warrant for defendant's arrest); *State* v. *Petit*, 119 La. 1013; *Glassinger* v. *State*, 24 Ohio St. 206; *State* v. *Lewis*, 31 Wash. 75, 77–78; coroners, *Jackson* v. *State*, 74 Ala. 26, 29; *O'Conner* v. *State*, 9 Fla. 215; *State* v. *Wright*, 53 Me. 328; school district officers, in a trial for forging school district orders, *State* v. *McDonald*, 59 Kan. 241, 244; and a county superviser, *State* v. *Adams*, 20 Iowa 486. In the two cases in the District of Columbia which were decided prior to the *Crawford* case, it was held that one who held "a subordinate office under the District of Columbia" and a "stamp agent", working for an annual compensation from the United States, were not disqualified. *United States* v. *Lee*, 15 App. D. C. 489; *United States* v. *Barber*, 21 App. D. C. 456, 471–472.

It results that in three States the public official has been held disqualified to serve as a juror in state cases where his connection was with the prosecuting or law enforcement branches of the government and actual bias was to be expected. But, with the possible exception of the *Crawford* case,

we have been able to find no case where the public employee, merely because of his employment by the government, has been held disqualified to serve as a juror in government cases. In eighteen States, one Circuit Court of Appeals, one territory, and the Court of Appeals of the District of Columbia (before the *Crawford* case) the public official has been held a qualified juror in government cases. It is plain that the rule of the English common law has been fully received into the American common law and that neither in England nor America is mere employment by the Government thought sufficient to disqualify the juror from serving in government cases.

6. Government Employees Are Qualified Jurors in Government Cases Irrespective of the Act of August 22, 1935

We believe that the only reasonable construction of the Act of August 22, 1935, is that it was intended not only to remove the exemption from jury service of the "salaried officers of the United States or of the District of Columbia" but was also designed to make Government employees and pension holders qualified jurors in Government cases (see pp. 15–16, *supra*). But it is conceivable that the Act may be construed as merely intended to remove this exemption, the specification of Government pension holders and contractors being added out of excess of caution. But we respectfully submit that if our analysis of the common law authorities is correct, and if this Court limits

or reexamines the decision in *Crawford* v. *United States*, 212 U. S. 183, the decision below must be reversed in any event, because the jurors who served in this case were qualified at common law, irrespective of the Act.

IV

EVEN HAD THE COMMON LAW FORBIDDEN A CROWN SERVANT TO SERVE AS A JUROR IN A CROWN CASE, THE ACT DOES NOT IMPAIR AN ESSENTIAL ELEMENT OF TRIAL BY AN IMPARTIAL JURY, AND THUS DOES NOT INFRINGE THE SIXTH AMENDMENT

1. Federal Decisions under the Sixth and Seventh Amendments

The Government believes that the common law authorities establish beyond question that the Crown servant was not for this reason alone disqualified to act as a juror in a Crown case. From this it inescapably follows that the Sixth Amendment cannot forbid Congress to authorize the use of disinterested Government employees as jurors in a Government case. However, since *Crawford* v. *United States*, 212 U. S. 183, may reasonably be construed to be a decision that the common law forbade a government employee to serve as a juror in any government case, it is thought desirable to demonstrate that, even if the common law rule as to servants of a party had been applicable to the Crown servant, the Sixth Amendment does not prevent the removal of this disqualification.

The *Crawford* case itself is persuasive authority that the Sixth Amendment does not prevent any modification of the common law which may be thought to inhere in the Act of August 22, 1935. There this Court held a juror to be disqualified in a prosecution for fraud of the Post Office Department because he operated a subpostal station in his drug store, receiving an annual compensation from the United States. The ground of the decision was that the Code of the District of Columbia did not supersede the entire body of the common law disqualifications of jurors and that at common law an employee of a party was not a qualified juror. But the opinion makes plain that, had there been a statute removing the disqualification, no objection could have been made to the presence of the juror. Mr. Justice Peckham, to indicate the importance of the question, said (p. 194):

> There may be statutes in the different States as to qualifications of jurors which in their construction would not prevent the application of the common law in regard thereto, and so the question of qualification being the same in the Federal as in the state courts (Rev. Stat. Sec. 800; 1 Comp. Stat., p. 623), may be a general one.

The implication is obvious that the Federal courts in States where this disqualification had been removed by statute would not be subject to the rule of the *Crawford* case. This implication is confirmed by the following passage (p. 195):

> We do not think that Sec. 215 of the code of the District includes the whole subject of the qualifications of jurors in that District. If that section, together with Sec. 217, were alone to be considered, it might be that the juror was qualified.

Finally, the Court summarized (p. 196) *Block* v. *State*, 100 Ind. 357, 362, the only case cited in support of the decision, as holding:

> * * * in accordance with the above rule of the common law, and that the Indiana statute upon the qualifications of jurors did not strike out the rule of the common law on the subject, *when not inconsistent with the statute.* (Italics added.)

It is believed that these passages speak with a clarity such that the *Crawford* case must be taken to establish, by way of dictum, that the Federal Constitution contains nothing to prevent employees of the United States from serving on juries in cases in which the Government is a party. It is, at the least, abundantly plain that the *Crawford* decision is, and was intended to be, wholly inapplicable to the Constitutional question raised by the statutory removal of the disqualification there established.

The dicta of the *Crawford* case have greater force when viewed against the body of constitutional law which has grown about the Sixth and Seventh Amendments. This Court has frequently stated the rule by which to determine whether a modification of the jury system infringes on the

constitutional guaranty of the jury known to the common law. As this Court has said of the Seventh Amendment, "its aim is not to preserve mere matters of form and procedure but substance of right." *Walker* v. *New Mexico & Southern Pacific Railroad,* 165 U. S. 593, 596. Again, speaking of the Seventh Amendment, this Court has declared, in *Ex parte Peterson,* 253 U. S. 300, 309–310:

> It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

Patton v. *United States,* 281 U. S. 276, 306, makes it clear that this rule is fully as applicable to the Sixth as to the Seventh Amendment. In upholding a conviction by a jury of eleven, to which the defendant had consented on the illness of the twelfth juror, the Court recognized that at common law there was no power to waive his right to a full jury, but stated:

> But this phase of the matter we do not stop to consider, for the rule of the common law,

whether exclusive or subject to exceptions, was justified by conditions which no longer exist; and as the Supreme Court of Nevada well said in *Reno Smelting Works* v. *Stevenson,* 20 Nev. 269, 279:

"It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a law when that reason utterly fails—*cessante ratione legis, cessat ipsa lex.*"

While the right to challenge for *actual* bias may well be said to be fundamental to trial by an impartial jury, *Lewis* v. *United States,* 146 U. S. 370, 376, the Government submits that any modification of the common law rule which was made by the Act of August 22, 1935, is well within the scope of the legislative freedom marked out by these decisions. It has been demonstrated in an earlier section (pp. 16–18, *supra*) that the Act of August 22, 1935, does not make the Government employee immune to the ordinary challenge for cause. The sole result of the Act is to make qualified a juror who, in a Government case, might be thought subject to a wholly theoretical bias in favor of the United States by virtue of his Government employment. If there be any factual support for the charge of bias, he is subject to challenge for cause.

Instructive analogies may be found in other decisions under the Sixth Amendment. It does not prevent a waiver of the right to have a petit jury of twelve, although such waiver could not be made at common law. *Patton* v. *United States, supra.*

The purgation of a contemnor by oath was a recognized curiosity of the common law when the Sixth Amendment was adopted, yet that Amendment does not forbid the abolition of this means of securing a jury trial on a charge of criminal contempt. *Clark* v. *United States,* 289 U. S. 1, 19; *United States* v. *Shipp,* 203 U. S. 563, 574–575.

The peremptory challenge has been described by this Court as "one of the most important of the rights secured to the accused", the Court adding that, "Any system for the empanelling of a jury that presents [*sic*] or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Pointer* v. *United States,* 151 U. S. 396, 408. Yet Congress has exercised unquestioned power in reducing the number of such challenges in non-capital felonies from the twenty allowed at common law (*Blackstone,* Commentaries, IV, 354; *Coke* on Littleton, 156b) to ten. Revised Statutes, sec. 819. The common law privilege that each co-defendant have his full number of challenges may be changed by Act of Congress so that the peremptory challenges must be exercised as though there were but one defendant. *Stilson* v. *United States,* 250 U. S. 583, 586.

At common law the juror who had formed an opinion as to the merits of the controversy was disqualified to serve as a juror (*Hawkins,* Pleas of the Crown, II, c. 43, sec. 28). Yet there is no denial of the impartial jury secured by the Sixth Amendment if the legislature or the Court recog-

nizes the changed conditions flowing from a widened circulation of newspapers and modifies this old disqualification. *Reynolds* v. *United States,* 98 U. S. 145, 155–157; *Hopt.* v. *Territory of Utah,* 120 U. S. 430, 432–436; *Spies* v. *Illinois,* 123 U. S. 131, 168–170; *Holt* v. *United States,* 218 U. S. 245, 248.

Similarly, although contrary to the common law procedure (see p. 24, *supra*), none has ever doubted the constitutionality of section 819 of the Revised Statutes, which provides that all challenges to jurors shall be tried by the Court.

The common law jury, of course, contained no woman among its members. But the Sixth Amendment has not prevented modification of this feature. *Tynan* v. *United States,* 297 Fed. 177 (C. C. A. 9th), certiorari denied, 266 U. S. 604; *Hoxie* v. *United States,* 15 F. (2d) 762 (C. C. A. 9th), certiorari denied, 273 U. S. 755; *Commonwealth* v. *Maxwell,* 271 Pa. 378.

Rules, suggested at a conference of the senior Circuit Judges, which materially restrict the scope of *voir dire* examination in requiring that it be done by the judge, do not impair the impartiality of the jury so chosen. *Kurczak* v. *United States,* 14 F. (2d) 109, 110 (C. C. A. 6th); *Bradshaw* v. *United States,* 15 F. (2d) 970, 971 (C. C. A. 9th); *Carroll* v. *United States,* 16 F. (2d) 951, 955 (C. C. A. 2d), certiorari denied 273 U. S. 763; *Falter* v. *United States,* 23 F. (2d) 420, 426 (C. C. A. 2d), certiorari denied, 277 U. S. 590;

Williams v. *United States,* 46 F. (2d) 731, 733 (C. C. A. 5th); *Paschen* v. *United States,* 70 F. (2d) 491, 495 (C. C. A. 7th).

At common law the alien, the better to secure an impartial trial, was entitled to have his case tried by a jury *de medietate linguae,* composed of six citizens and six aliens. *Bacon,* Abridgment, V, 359–362; *Blackstone,* Commentaries, III, 360–361.[45] In a few early cases in the federal and state courts such a jury was summoned. *United States* v. *Cartacho,* Fed. Cas. No. 14,738 (C. C. Va., 1823, Marshall, C. J., and Tucker, J.); *Respublica* v. *Mesca,* 1 Dall. 73 (O. & T., Phila., 1783). Yet, although the Sixth Amendment is fully applicable to aliens, *Wong Wing* v. *United States,* 163 U. S. 228, 238, it has not prevented the abolition of this type of jury as it existed at common law. *United States* v. *McMahon,* 4 Cranch C. C. 573, 26 Fed. Cas. No. 15,699 (C. C., D. C., 1835); 12 Op. Atty. Gen. 319; cf. *Kentucky* v. *Wendling,* 182 Fed. 140 (C. C., Ky.).

There has been allowed a similar leeway for development of the jury system in questions arising under the Seventh Amendment. While changes which are considered to be a material alteration of the common law division between the judge and the

[45] The fears of Blackstone that the Act of 3 Geo. II c. 25 might be construed to abolish this jury were not realized. See *Forsyth,* Trial by Jury, 228–230; *Thompson & Merriam,* Juries, secs. 16, 17. Not until 1870 was the jury *de medietate linguae* abolished by statute in England. 33 Vict., c. 14, sec. 5.

jury have been condemned, see *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364; *Dimick* v. *Schiedt*, 293 U. S. 474, there have nonetheless been a number of significant modifications which have been held not to alter the essential nature of the common law trial by jury.

Thus, the Amendment does not prevent a territorial legislature from enacting, contrary to the common law, that the judge might enter judgment in conformity with a special verdict and contrary to a general verdict. *Walker* v. *Southern Pacific Railroad*, 165 U. S. 593, 595–598 It does not prevent a preliminary hearing before an auditor empowered to make findings *prima facie* correct, although such an official was unknown to the common law jury trial. *Ex parte Peterson*, 253 U. S. 300, 307–311. The Amendment, notwithstanding the common law practice, does not prevent the appellate court from ordering a new trial on one issue alone. *Gasoline Products Co.* v. *Champlin Co.*, 283 U. S. 494, 497–499.

If these numerous modifications of the common law jury may validly be made under the Sixth and the Seventh Amendments, the Government believes that it follows as of course that the Sixth Amendment cannot forbid a modification (if it should be thought such) of the common law rule which does no more than to make qualified a juror subject to a wholly hypothetical bias and subject to challenge should there be any foundation in fact for this supposed bias. Any change, so far as the partiality of

the jury is concerned, is one in name only, one which leaves untouched the full right to challenge for actual partiality.

2. Statutes and Decisions of the States

The statutes and the decisions of the States have a very real importance in determining whether the Sixth Amendment operates to forbid any modification of the common law which may be thought to be contained in the Act of August 22, 1935. In the first place, as this Court has said, the constitution of each State contains a clause guaranteeing that the accused shall have a trial by an impartial jury. *Hayes* v. *Missouri,* 120 U. S. 68, 69.[46] Thus each decision and each statute represents a judgment of the court or the legislature that the constitutional requirement of an impartial jury has not been violated. This Court has testified to the importance which state constitutional decisions bear in ascertaining the content of the Sixth and Seventh Amendments. *Gasoline Products Co.* v. *Champlin Co.,* 283 U. S. 494, 497; *Patton* v. *United States,* 281 U. S. 276. In the second place, the acts and decisions, so far as they evidence any general tendency to modify the common law in a given direc-

[46] The statement is not literally correct. The word impartial does not appear in the constitutions of California (Art. I, sec. 7), Idaho (Art. I, sec. 13), Massachusetts (Part I, sec. 12), New Hampshire (Art. 16), New York (Art. I, sec. 2), North Carolina (Art. I, sec. 13), North Dakota (Art. I, secs. 7, 8); Utah (Art. I, sec. 10), or West Virginia (Art. III, sec. 14). However, none would doubt but that the requirement of impartiality is present by implication.

tion, show that the modification in question does not reach to the essentials of the impartial jury of the common law. Finally, Section 800 of the Revised Statutes makes the state laws as to the qualifications of jurors applicable to the Federal courts, *Pointer* v. *United States,* 151 U. S. 396, 407; *Crawford* v. *United States,* 212 U. S. 183, 194, so that the state practice may be taken to have been applied without objection in the federal courts.

The decisions of state courts relating to the service of government employees as jurors in government cases have been set forth in an earlier section (pp. 54–58, *supra*). No state court has held such an employee disqualified when he was connected with a branch of the government which had no interest in the outcome of the case. In eighteen States a public official has been held to be a qualified juror in a state case.

In numerous States the statutory grounds of challenge for implied bias are so phrased as to make it clear that the government employee is not for this reason subject to challenge in suits to which the State is a party. Thus, Section 377 of the New York Code of Criminal Procedure provides:

> A challenge for implied bias may be taken for all or any of the following causes, *and for no other:*
>
> 1. Consanguinity or affinity within the ninth degree, *to the person alleged to be injured* by the crime charged, *or on whose complaint the prosecution was instituted, or to the defendant;*

> 2. Bearing to him the relation of guardian or ward, attorney or client, or client of the attorney or counsel for the people or defendant, master or servant, or landlord or tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment or wages; * * * (Italics added.)

It will be noted that the master-servant relationship, as the other grounds of partiality, is carefully limited to the individuals figuring in the prosecution, and that the legislature had no thought that a similar relationship to the State could raise a presumption of bias. Substantially similar statutes, apparently modeled on the New York provision, have been adopted in ten other jurisdictions.[47] In four other States the statutes provide substantially the same grounds of challenge, save that the statutes do not expressly exclude other grounds.[48] However, the care with which the statutes limit the relationship chal-

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[47] California Penal Code of 1872, sec. 1074; Idaho Code, 1932, sec. 19–1920 (2); Minnesota, Mason's Stats., 1927, sec. 10738; Montana, Rev. Code 1921, sec. 11960; Nevada, Comp. Laws 1929, sec. 10946; North Dakota, Comp. Laws 1913, sec. 10810; Oklahoma, Comp. Stat. 1921, sec. 2676; Oregon, Ann. Code 1930, vol. 1, sec. 13–916; South Dakota, Comp. Laws 1929, sec. 4857; Utah Rev. Stat. 1933, sec. 105–31–19.

[48] Arizona, Rev. Code 1928, sec. 5035; Arkansas, Crawford & Moses Digest 1921, sec. 3160; Iowa, Code 1931, sec. 13830; Kentucky, Carroll's Code 1927, Crim. Code, sec. 210.

lenges to the individuals appearing in the case justifies treating these States as excluding public employment as a grounds of challenge in state cases.

In result, our analysis of the state law shows that in two states challenges have (rightfully, we believe) been sustained to deputy sheriffs or to a deputy of the prosecuting attorney. Apart from these decisions, and six where a statute expressly excluded the public officer, no challenge, so far as we have been able to ascertain, has been sustained to a juror in a state case because of his public employment. In eighteen States there are judicial decisions and in fifteen States [49] there are statutes which make it clear that the juror's public employment is no bar to his service in state cases.

The Government has no doubt but that this general rule represents no departure from the common law. But if it be viewed as such, it is worthy of note that, in the absence of actual bias, it is a considerably less consequential modification of the jury system than other modifications which have never been thought to impair the impartial jury secured by the state constitutions. The general principle governing these modifications seems to be that the constitutional right to an impartial jury is wholly consistent with giving to the legislature full power to

[49] Three of these States are also represented in the group in which the rule is established by judicial decision.

prescribe the qualifications of jurors. *In re Mana,* 178 Cal. 213; *Commonwealth* v. *Dorsey,* 103 Mass. 412, 418; *Walter* v. *People,* 32 N. Y. 147, 159; *People* v. *Cosmo,* 209 N. Y. 91.

At common law a juror was disqualified if he was a member of the municipality or borough which was a party to the suit. *Coke* on Littleton, I, 157a. This rule has generally been abandoned.[50] At common law the juror was subject to challenge in principal if he were within the ninth degree of consanguinity or affinity to a party. *Coke* on Littleton, I, 157a; *Blackstone,* Commentaries, III, 363. The legislatures of many States have materially modified this rule,[51] and yet none has supposed that

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[50] See, for example, Ala. Code, 1922, sec. 8664; *City of Prescott* v. *Sumid,* 30 Ariz. 347; Calif. Code of Civil Proc. 1931, c. 4, sec. 602 (5); Colo. Ann. Code of Civil Proc., sec. 199 (5); *Warner* v. *Town of Gunnison,* 2 Colo. App. 430; Fla. Comp. Gen. Laws, 1927, sec. 4451 (4); Ga. Code, 1933, sec. 59–715; *Pikeville* v. *Riddle,* 191 Ky. 231, 232; Maine Rev. Stat. 1930, c. 96, sec. 108; *City of Auburn* v. *Paul,* 110 Me. 192, 197–199; Mass. Ann. Laws, vol. 8, c. 234, sec. 30; *Commonwealth* v. *Ryan,* 5 Mass. 89; *Commonwealth* v. *Brown,* 147 Mass. 585, 591; Mich. Comp. Laws, 1929, sec. 14277; *Smith* v. *The German Ins. Co.,* 107 Mich. 270; *Detroit* v. *Detroit Railway Co.,* 134 Mich. 11; N. J. Comp. Stat. vol. 3, sec. 39; *Hildreth* v. *City of Troy,* 101 N. Y. 234; *Maddex* v. *Columber,* 114 Ohio St. 178; *Scranton* v. *Gore,* 124 Pa. 595.

[51] The modifications consist in reducing the degree. The statutory degrees vary from the third to the sixth. Alabama, Code 1923, sec. 8610; Arizona, Revised Code 1928, sec. 1905; Arkansas, Crawford & Moses Digest 1921, sec. 6334; California, Penal Code, sec. 1074; Colorado, Ann. Code Civ. Proc., sec. 199; Florida, Comp. Gen. Laws 1927,

in so doing they have deprived suitors of an impartial jury.

The common law similarly disqualified a juror who had formed an opinion as to the merits of the controversy (see pp. 64–65, *supra*). This rule has been widely modified by statute [52] and by decision,[53] so that the juror is generally eligible who satisfies the court that he can disregard his existing opinion should the evidence be to the contrary. The constitutionality of these statutes seems to be unquestioned at this time. See *Stokes* v. *People*, 53 N. Y. 164; *Hopt* v. *Territory of Utah*, 120 U. S. 430, 432–436.

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sec. 4359; Idaho Code Ann. 1932, sec. 19–1920; Indiana, Burns' Ann. Stat. 1933, sec. 9–1504–4; Louisiana, Marr's Rev. Code of Practice, Art. 507 (1); Missouri, Rev. Stats. 1929, sec. 8771; Nebraska, Comp. Stat. 1922, sec. 10134; North Dakota, Comp. Laws 1913, sec. 7616; Oklahoma, Comp. Stat. 1921, sec. 2676; Oregon, Code Ann. sec. 2–207; South Dakota, 1929, secs. 2502, 4857; Tennessee, Williams Code Ann. 1934, sec. 9990; Utah, Rev. Stat. 1933, sec. 104–24–10; Vermont, Pub. Laws 1933, sec. 1237; Washington, 2 Rem. Rev. Stat. sec. 330; Wyoming, Rev. Stat. 1931, sec. 33–704.

[52] Arizona, Rev. Code 1928, sec. 5036; Arkansas, Crawford & Moses Digest 1921, sec. 3163; California, Penal Code, sec. 1076; Illinois Callaghan's Stats., c. 78, par. 14; Indiana Burns' Stats. Ann. 1933, sec. 9–1504; Mississippi, Code 1930, sec. 30; Montana, 1895 Code, sec. 2051; Nevada, Comp. Laws 1929, sec. 10948; New York, Code Crim. Proc., sec. 376; Tennessee, Williams' Code Ann., 1934, sec. 10008; Washington, Comp. Stat. 1922, sec. 331.

[53] See the numerous decisions collected in *Bishop*, New Criminal Procedure, II, 701–713.

The Government submits that any of these modifications of the common law jury system is fully as likely to affect the impartiality of the jury as is the mere declaration that a Government employee is a qualified juror in a Government case, when the employee remains subject to challenge for cause. Against a background of this nature it is not surprising that thirty States, by statute or decision, have ruled that there is no disqualification in Government cases attaching to the Government employee by the mere fact of his employment. No state court has ruled that a public official whose position bears no relation to the branches of the government interested in the outcome of the case is a disqualified juror in a state case. If the common law rule had ever been to the contrary, this unanimity of opinion would be evidence of the most persuasive character that declaring such a juror to be qualified constitutes no infringement of the constitutional guaranty of an impartial jury.

V

THE ACT DOES NOT DEPRIVE THE RESPONDENT OF DUE PROCESS OF LAW

Respondent, in his appeal to the court below, assigned as error the failure of the Police Court to hold the Act of August 22, 1935, to be a violation of the Fifth Amendment (R. 8). The court below considered only the Sixth Amendment (R. 8–14). Respondent apparently intends to urge the

Fifth Amendment in this Court (Memorandum of respondent, 3).

The Government believes that it has demonstrated that the Act does nothing to impair the defendant's right to challenge a juror who has actual bias (see pp. 16–18, *supra*), that the Act is necessary to the efficient operation of the jury system in the District of Columbia (see pp. 9–14, *supra*), and that it in no manner infringes on the guaranty of an impartial jury which is found in the Sixth Amendment. From this it follows *a fortiori* that it does not transgress the more general prohibition of the Fifth Amendment.

The Memorandum of Respondent (p. 3) raises the Fifth Amendment point in terms of a supposed objection to allowing the Government to challenge a juror in the employment of the private party, while denying the private party the privilege to challenge because of Government employment. It is not clear whether this objection relates to a supposed partiality of the jury so chosen or to an improper classification. If it be the former, the part of this brief which is directed to the Sixth Amendment affords a complete answer. If it be the supposed inequality of classification, it is necessary only to point out that any Government employee who had an interest in the outcome of the litigation comparable to that of a private employee would be subject to challenge for cause because of bias.

The Government is unable to isolate any substantial objection to the Act of August 22, 1935, on the grounds of due process, which is not more appropriately raised under the Sixth Amendment. If there be any such objection, it seems to be fully answered by the opinion of this Court in *Snyder* v. *Massachusetts,* 291 U. S. 97. Since the content of the due process clause of the Fifth Amendment is no broader than that of the Fourteenth Amendment, the summary statement of the Court (p. 105) is fully applicable to the present case:

> The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Twining* v. *New Jersey,* 211 U. S. 78, 106, 111, 112; *Rogers* v. *Peck,* 199 U. S. 425, 434; *Maxwell* v. *Dow,* 176 U. S. 581, 604; *Hurtado* v. *California,* 110 U. S. 516; *Frank* v. *Mangum,* 237 U. S. 309, 326; *Powell* v. *Alabama,* 287 U. S. 45, 67. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. Consistently with that amendment, trial by jury may be abolished. *Walker* v. *Sauvinet,* 92 U. S. 90; *Maxwell* v. *Dow, supra; N. Y. Central R. Co.* v. *White,* 243 U. S. 188, 208; *Wagner Electric Co.* v. *Lyndon,* 262 U. S. 226, 232.

Indictments by a grand jury may give way to informations by a public officer. *Hurtado* v. *California, supra; Gaines* v. *Washington,* 277 U. S. 81, 86. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state. *Twining* v. *New Jersey, supra.* What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it. *Twining* v. *New Jersey, supra; Powell* v. *Alabama, supra,* pp. 68, 71; *Holmes* v. *Conway,* 241 U. S. 624. Cf. *Blackmer* v. *United States,* 284 U. S. 421, 440.

CONCLUSION

For the reasons which have been set forth in the foregoing, it is respectfully submitted that the judgment of the court below should be reversed and that of the Police Court should be affirmed.

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